

September 12, 2018

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BY E-MAIL

Peter B. Robb, Esq.
General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570-0001

Re: University of Chicago
Case No. 13-CA-217957

Dear Mr. Robb,

We are recently retained co-counsel to University of Chicago (the "University") in the unfair labor practice case identified above, a "test of certification" case now pending before the Board on Counsel for the General Counsel's motion for summary judgment. (Our Notice of Appearance is attached.) The underlying representation case is Case No. 13-RC-198365.

Briefly, on May 7, 2017, the Charging Party, Healthcare, Professional, Technical, Office, Warehouse and Mail Order Employees, Local 743, IBT ("Local 743") filed a petition to represent a unit of graduate and undergraduate students performing services in the University's libraries (Case No. 13-RC-198365). In that representation proceeding, the University sought to litigate the issue of the students' employee status and to challenge the application of the NLRB's *Columbia University* decision. The University was wrongfully denied that opportunity, in violation of General Counsel Memorandum 15-06 ("Guidance Memorandum on Representation Case Procedure Charges Effective April 14, 2015"). There, your predecessor, Richard F. Griffin, Jr., Esq., wrote that "[i]ssues as to whether individuals are employees within the meaning of Section 2(3) of the Act must be litigated at the initial hearing if they involve the entire unit," as in this case.

Accordingly, at a hearing held on May 17, 2017, the Hearing Officer, acting on behalf of the Regional Director, rejected the University's Offer of Proof on issues properly raised in its statement of position (Form NLRB-505), regarding not only the employee status of the petitioned-for students, but also the temporary and/or casual nature of their "employment." In addition, the University sought to defer the election until the Fall 2017 quarter to ensure that the eligible voters would have an opportunity to cast a ballot. Instead, the Regional Director insisted on conducting the election at the end of the

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Spring 2017 quarter, despite the fact that students were then preparing for and taking their final examinations.

The University immediately filed an Expedited Request for Review and Motion to Stay the Election, seeking reversal of the Hearing Officer's ruling rejecting the University's Offer of Proof and an opportunity to present evidence on the critical issue of employee status, among others, and objecting to the scheduling of the election during final exams. The Board denied that Request for Review, with then-Chairman Miscimarra dissenting from the denial of relief explaining that he would "grant review on the basis that substantial issues exist regarding the extent to which the bargaining unit consists of students whose positions were closely related to their education," and thus would be an inappropriate unit for bargaining for the reasons expressed in his *Columbia* dissent. Chairman Miscimarra added that he would grant review as well with respect to whether the petitioned-for students are temporary employees.

As the University predicted in its Expedited Request for Review, turnout at the election was low due to the Regional Director's decision to schedule the vote during final exams. Only about 40 percent of eligible voters cast ballots.

Thereafter, extensive post-election proceedings were held on the University's objections to conduct affecting the outcome of the election -- with the University preserving its position on the student status and temporary/casual employee issues, at every step in those proceedings. Ultimately, the University's objections were overruled and a Certification of Representative was issued, which the Board left undisturbed in its denial of the University's Request for Review of the Regional Director's March 19, 2018 Supplemental Decision and Certification, with "Members Emanuel and Kaplan not[ing] that they would, in a future appropriate case, consider whether and under what circumstances students qualify as 'employees' within the meaning of Section 2(3) of the Act."

The University has refused to recognize and bargain with Local 743, resulting in an unfair labor practice complaint issued by the Regional Director on June 15, 2018, and a Motion for Summary Judgment filed with the Board by Counsel for the General Counsel on July 10, which the University vigorously opposed on July 25. (A copy of the University's opposition to the motion (without exhibits) is attached.)

Having improperly denied the University an opportunity to litigate the all-important employee status issues raised by the petition in Case No. 13-RC-198365 -- in disregard for the specific directives contained in General Counsel Memo 15-06 -- Counsel for the General Counsel's current Motion for Summary Judgment is out-of-bounds. It certainly



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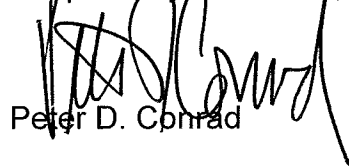
cannot be granted on the ground that the University is seeking to relitigate issues from the underlying representation case. Those issues were **never litigated**; indeed, litigation was foreclosed by the Regional Director. To now grant the motion for summary judgment on that ground would be a complete denial of procedural due process on an issue the importance of which cannot be overstated.

In these unique circumstances, allowing the motion to proceed will compound the due process violation that already has occurred, resulting in virtually certain appellate litigation, and a likely remand to the Board to make the record that should have been allowed by the Regional Director in the first instance. The issues presented by the petition and the related unfair labor practice case are enormously important to institutions of higher education across the nation. In all the litigation that has followed the Board's controversial decision two years ago in *Columbia University*, the current Board has been deprived of an opportunity to revisit the Section 2(3) issue decided in that case.

That opportunity can be had in this case if you exercise your authority to withdraw the pending motion for summary judgment and remand the case to the Regional Director to revoke the Certification of Representative, reopen the representation proceeding, and take evidence on the employee status of the petitioned-for students. Alternatively, Counsel for the General Counsel should be directed to litigate the issues raised by the complaint before an administrative law judge of the Board.

We respectfully ask that you do so before the Board has ruled on the pending motion. One way or another, the University must be given an opportunity to litigate fully. Due process requires no less.

Respectfully submitted,



Peter D. Conrad

PDC/lb
Enclosure

cc: Peter Sung Ohr, Regional Director
Paul Salvatore, Esq.
Jacob M. Rubinstein, Esq.
Amanda Clark, Esq.
Matthew Jarka, Esq.

NATIONAL LABOR RELATIONS BOARD

NOTICE OF APPEARANCE

UNIVERSITY OF CHICAGO,

Respondent,

and

HEALTHCARE, PROFESSIONAL, TECHNICAL, OFFICE,
WAREHOUSE AND MAIL ORDER EMPLOYEES, LOCAL
743, IBT,

Charging Party.

CASE No. 13-CA-217957

☒ REGIONAL DIRECTOR

☐ EXECUTIVE SECRETARY
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

☒ GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
Washington, DC 20570

THE UNDERSIGNED HEREBY ENTERS APPEARANCE AS REPRESENTATIVE OF _____

University of Chicago, as Co-Counsel with Jacob M. Rubinstein, Esq., Cozen O'Connor

IN THE ABOVE-CAPTIONED MATTER.

CHECK THE APPROPRIATE BOX(ES) BELOW:

☒ REPRESENTATIVE IS AN ATTORNEY

☐ IF REPRESENTATIVE IS AN ATTORNEY, IN ORDER TO ENSURE THAT THE PARTY MAY RECEIVE COPIES OF CERTAIN DOCUMENTS OR CORRESPONDENCE FROM THE AGENCY IN ADDITION TO THOSE DESCRIBED BELOW, THIS BOX MUST BE CHECKED. IF THIS BOX IS NOT CHECKED, THE PARTY WILL RECEIVE ONLY COPIES OF CERTAIN DOCUMENTS SUCH AS CHARGES, PETITIONS AND FORMAL DOCUMENTS AS DESCRIBED IN SEC. 11842.3 OF THE CASEHANDLING MANUAL.

(REPRESENTATIVE INFORMATION)

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SIGNATURE: _____

(Please sign in ink.)

DATE: _____

¹ IF CASE IS PENDING IN WASHINGTON AND NOTICE OF APPEARANCE IS SENT TO THE GENERAL COUNSEL OR THE EXECUTIVE SECRETARY, A COPY SHOULD BE SENT TO THE REGIONAL DIRECTOR OF THE REGION IN WHICH THE CASE WAS FILED SO THAT THOSE RECORDS WILL REFLECT THE APPEARANCE

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

UNIVERSITY OF CHICAGO

And

Case 13-CA-217957

**HEALTHCARE, PROFESSIONAL, TECHNICAL,
OFFICE, WAREHOUSE AND MAIL ORDER
EMPLOYEES, LOCAL 743, IBT**

**EMPLOYER'S RESPONSE TO MOTION FOR SUMMARY JUDGMENT AND
NOTICE TO SHOW CAUSE**

Pursuant to the Board's Order dated July 11, 2018 and Section 102.24 of the Board's Rules and Regulations, the Employer, the University of Chicago ("University"), submits this Response to the General Counsel's Motion for Summary Judgment ("Motion") and the Board's Notice to Show Cause why the Motion should not be granted.

I. INTRODUCTION

This is a test of certification case. Throughout the proceedings in the related representation case (13-RC-198365), the University attempted to present evidence showing that the proposed unit consists of students who are not employees as defined by the Act and who, even if they are employees, are temporary and/or casual employees specifically excluded from the proposed bargaining unit and/or are not entitled to collectively bargain under the Act. Region 13 refused to allow the University to present evidence on these points, which prevented the University from developing an evidentiary record on critical, statutory issues such as whether the students in the proposed unit are employees within the meaning of Section 2(3) of the Act and whether they are temporary or casual employees not entitled to engage in collective bargaining.

While the University recognizes that the Board typically will not allow re-litigation of issues that were raised in the underlying representation case, it will do so in the case of “special circumstances.” *Westwood One Broadcasting Servs., Inc.*, 323 N.L.R.B. No. 175, (1997); *see also Sub-Zero Freezer Co.*, 271 NLRB 47, 47 (1984). Moreover, the Board is not precluded from reconsidering such previously litigated issues if doing so will correct erroneous conclusions from prior proceedings. *St. Francis Hospital*, 271 NLRB 948, 949 (1984).

Here, as explained in greater detail below, special circumstances exist, and there are ample reasons for the Board to reconsider previously-litigated issues to correct erroneous conclusions from prior proceedings. Indeed, there are critical and unresolved statutory questions relating to whether the petitioned-for unit members are employees under the Act and if the Region’s decisions improperly foreclosed the University’s ability to advance its position on that important question. The Region’s refusal to allow the University to present evidence at the May 17, 2017 pre-election hearing was contrary to Board Rules and Regulations and a violation of due process. The Region’s prejudicial error infected every subsequent stage of the representation case proceeding, and warrants denying the Motion for Summary Judgment, vacating the 2018 Supplemental Decision, and remanding the case back to the Region for an evidentiary hearing. *See Ozark Auto. Distribs., Inc. v. NLRB*, 779 F.3d 576, 585-86 (D.C. Cir. 2015) (vacating Board’s certification of bargaining representative because of prejudicial error in the proceedings leading to the certification order).

In sum, this case presents a critical issue of statutory interpretation that precludes certification of the Union and the newly-reconstituted Board should take this final opportunity to resolve the issue before it is litigated in a federal appellate court.

II. STATEMENT OF THE CASE

A. The Petition and Procedural History

1. The Petition

On May 7, 2017, Petitioner filed a petition seeking to represent the following proposed unit of student workers:

Included: All part-time hourly-paid student employees of the University of Chicago Libraries, including students employed at the Joseph Regeinstien [sic] Library, the Joe and Rika Mansueto Library, Eckhart Library, John Crerar Library, D'Angelo Law Library and the Social Services Administration Library.

Excluded: All employees represented by other labor organizations and covered by other collective bargaining agreements, temporary employees, professional employees, supervisory and managerial employees as defined by the National Labor Relations Act.

There were 226 students in the proposed unit who, while enrolled as students at the University, work part-time jobs in the University Library.

2. Procedural History

a. Pre-Election Proceedings

At a pre-election hearing on May 17, 2017, a Hearing Officer rejected the University's Offer of Proof on the issues raised in its Statement of Position¹ and refused to take evidence on any of those issues. Thereafter, on May 23, 2017, the Regional Director issued a Decision and Direction of Election. (Ex. 2 to GC's Motion, May 23, 2017 Decision and Direction of Election, "DDE"). In the

¹ In its Statement of Position, the University asserted that: (1) the 226 students in the proposed unit are not employees as defined by Section 2(3) of the Act because their relationship with the University is primarily educational, and the Board should reconsider and overturn its decision in *Columbia University*, 364 NLRB No. 90 (2016) and return to the correct legal standard announced in *Brown University*, 342 NLRB 483 (2004); (2) there are compelling policy reasons why the Board should not assert jurisdiction in this matter; (3) even if the proposed unit consists of employees as defined by the Act, they are temporary and/or casual employees who are excluded from the unit description and/or not permitted to engage in collective bargaining under the Act; and (4) if The Regional Director ordered an election notwithstanding these arguments, the election should not occur until the Fall 2017 quarter, to ensure proper enfranchisement of eligible voters.

DDE the Regional Director rejected, without an evidentiary record, the contentions the University made in its Statement of Position and at the pre-election hearing. The Regional Director ordered an election commencing on Friday, June 2, 2017 and ending on Thursday, June 8, 2017.

The University filed an Expedited Request for Review and Motion to Stay Election on May 25, 2017, requesting that the Board review the Regional Director's rejection of the University's Offer of Proof and refusal to take evidence at the pre-election hearing. (Ex. A to University's Response to Motion for Summary Judgment, "First RFR"; Ex. B to University's Response, "Offer of Proof").² In the first RFR, the University also objected to the timing of the election during final exam week when voter turnout was likely to be low. On June 1, 2017, the Board denied the First RFR (Ex. C, June 1, 2017 Board Order). Then-Chairman Miscimarra dissented from this denial, explaining he would "grant review on the basis that substantial issues exist regarding the extent to which the bargaining unit consists of students whose positions are closely related to their education," and thus would be an inappropriate unit for bargaining for the reasons expressed in his dissent in the *Columbia University* decision. (*Id.*) Then-Chairman Miscimarra further asserted that he would grant review with respect to whether the petitioned-for individuals are temporary employees. (*Id.*)

b. The Election and Post-Election Proceedings

The election took place on June 2 and on June 5-8, 2017. Out of 226 potential voters, only 93 cast ballots; 133 (almost 60 % of the unit) did not. The tally of ballots was 67 ballots cast for Petitioner, 13 ballots cast against Petitioner, and 13 challenged ballots. On June 15, 2017, the University filed the following Objections to Conduct of Election and Conduct Affecting the Results of the Election (Exhibit 4 to Motion, "Objections"):

² In the interest of clarity, the University will designate exhibits to the Response to the Motion for Summary Judgment with letters (A, B,) rather than numbers, which the GC has used to designate exhibits to the Motion for Summary Judgment.

1. The University objects to conduct affecting the results of the election because on June 2, 2017 Petitioner engaged in improper electioneering in a no-electioneering zone while the election was in progress.
2. The University objects to conduct affecting the results of the election because on June 2, 2017 Petitioner's agents, wearing union insignia, stationed themselves in locations where voters would be forced to pass in order to get to the polling places.
3. The University objects to the conduct of the election because the Regional Director's Decision to direct an election on June 2 and 5-8, 2017, in the midst of the College Reading Period (pre-final exam study period) and final exams at the University, was contrary to Board policy to ensure optimal enfranchisement of eligible voters, resulted in low voter turnout, and disenfranchised a significant number of eligible voters.
4. The University objects to the conduct of the election because the Regional Director erroneously denied the University a hearing on whether the students in the proposed unit are employees pursuant to Section 2(3) of the Act, and on whether they are temporary and/or casual employees.

(Ex. 4 to Motion).

On July 10, 2017, the Regional Director overruled the University's Objections without a hearing (Ex. 5 to Motion, July 2017 Supplemental Decision). The University then filed a Request for Review on July 24, 2017 (Ex. 6 to Motion, "Second RFR"). On December 15, 2017, the Board granted in part and denied in part the Second RFR (Ex. 7 to Motion for Summary Judgment, December 15, 2017 Board Order). Specifically, the Board granted the Second RFR as to Objection No. 2 but denied it as to Objection Nos. 1, 3 and 4. The Board remanded the case to the Regional Director for a hearing on Objection No. 2. The University filed a Motion for Reconsideration and Motion to Stay on December 26, 2017 (Exhibit 8 to Motion), which the Board denied on January 18, 2018. (Exhibit 9 to Motion).

A hearing on Objection No. 2 took place on January 16 and 18, 2018. The University introduced evidence at the hearing, and argued in its brief, that the Regional Director should have sustained Objection No. 2 and overturned the election because the union interfered with voters' free

choice by stationing its agents just outside the main entrance to the Regenstein Library, the primary polling place; by displaying a large “Union Yes” sign; and by creating “Vote Yes” signs which were posted at various locations around the Regenstein Library, including locations where voters would see them on their way to the polling place.

The Hearing Officer issued a Report on February 15, 2018 (Ex. 10 to Motion, February 15, 2018 Hearing Officer’s Report, referred to as “HOR”). The Hearing Officer credited the University’s testimony, and her factual findings were largely consistent with the University’s evidence. Yet, the Hearing Officer recommended that the Regional Director overrule Objection No. 2. On February 28, 2018, the University filed Exceptions to the HOR and a supporting brief. On March 19, 2018, the Regional Director issued the Supplemental Decision on Remand from the Board and Certification (Ex. 11 to Motion, March 19, 2018 Supplemental Decision, “2018 Supplemental Decision”). The Regional Director adopted the Hearing Officer’s finding that Petitioner’s conduct, stationing clearly-identifiable agents with a large Union Yes sign outside the Regenstein Library where the main polling place was located, did not reasonably tend to interfere with employees’ free choice at the polls. (*Id.*) The Regional Director also ruled that Petitioner’s agents did not engage in objectionable surveillance even though they spent much of the first day of voting standing outside the Regenstein Library’s main entrance, well-positioned to watch voters coming and going. (*Id.*).

On April 2, 2018, the University filed a Request for Review of the 2018 Supplemental Decision (Exhibit 12 to Motion, “Third RFR”). On May 21, 2018 the Board denied the Third RFR, but noted that “Members Emanuel and Kaplan note that they would, in a future appropriate case, consider whether and under what circumstances students qualify as “employees” within the meaning of Section 2(3) of the Act.” (Ex. 13 to Motion).

Meanwhile, on March 27, 2018, the Union sent the University a letter demanding recognition and bargaining. (Ex. 14 to Motion). On April 3, 2018, the University, through its counsel, sent the Union a letter stating that it would not recognize or bargain with the Union. (Ex. 15 to Motion). On June 14, 2018, the Union filed a first amended unfair labor practice charge against the Employer, alleging violations of Sections 8(a)(1) and (5) of the Act. (Ex. 16 to Motion). On June 15, 2018, the Region issued a complaint. (Ex. 18 to Motion), which the University timely answered (Ex. 20 to Motion). On July 10, 2018, the General Counsel filed its Motion to Transfer and for Summary Judgment and on July 11, 2018, the Board granted the request to transfer the proceeding and issued a Notice to Show Cause why the Motion should not be granted.

III. FACTS THE UNIVERSITY WAS PREPARED TO PROVE AT THE PRE-ELECTION HEARING

The genesis of the special circumstances that warrant denial of the Motion for Summary Judgment occurred at the pre-election hearing on May 17, 2017. There, the University submitted an Offer of Proof and was prepared to present evidence establishing that the proposed bargaining unit consists of individuals who are not employees as defined by the Act and who, even if they are employees, are temporary and/or casual employees who are specifically excluded from the proposed bargaining unit and/or are not entitled to collectively bargain under the Act. The following facts were contained in the University's Offer of Proof, and the University was prepared to introduce evidence to establish these facts at the hearing.

A. University Policies Regarding Student Employment

The sole reason students attend the University is to obtain a degree within the allotted timeframe. (Exhibit B to Response to Motion for Summary Judgment, University of Chicago's Offer of Proof, p. 3.) The University makes clear in its Student Manual that "additional employment is secondary to their student status." (*Id.* at 4-5.) While various departments and units across campus

provide students with meaningful work opportunities to advance their academic and professional goals and assist them in funding their education expenses, the central purpose of student enrollment is timely completion of degree requirements. (*Id.* at. 3.) Thus, the University has created student-specific positions throughout the institution. (*Id.* at 3-4.)

Students are not permitted to work more than 20 hours per week total in University positions absent explicit permission from their Dean of Students (“DOS”). (*Id.* at 4.) The DOS typically does not give permission for a student to work more than 20 hours a week unless the student articulates a good reason and assures the DOS that exceeding 20 hours per week of work will advance their academic goals without interfering with the student’s progress towards their degree. (*Id.* at 4.) Most often, students requesting an exception to the 20 hour per week limitation do so in order to take on another position at the University that is more closely aligned with their academic pursuits, such as a research position or teaching assistantship. (*Id.* at 5.) The University does not permit students who are on a leave of absence from their studies to work in student positions. (*Id.* at 4.) These policies and practices are intended to ensure that students focus primarily on their studies, and to discourage students from taking leave from their studies in order to work. (*Id.* at 4.)

B. The Student Library Positions At Issue

All students in the proposed bargaining unit members are hired on a quarter-to-quarter³ basis and serve in part-time hourly-paid positions at the Library reserved only for actively-enrolled students at the University. (*See, e.g., id.*, at 4.) There is an entirely separate job classification for staff library employees. Students are not permitted to work in such staff positions. Staff employees at the Library are represented by the union in a separate bargaining unit that encompasses all hourly-paid University clerical employees. (*Id.* at 4.) Approximately 30% of the students in the proposed

³ The University operates its academic calendar based on quarters, not semesters.

unit participate in the federal work study program, a form of financial aid for students in which the government subsidizes part of the pay they receive for working in the Library. (*Id.* at 4.)

Because each student in the proposed unit holds a student-specific Library position, the students' tenure in these positions is inherently tied to enrollment at the University. (*Id.*, at p. 6.) Moreover, students frequently come and go from their positions with the Library at their leisure and discretion. This movement in and out of student library positions occurs for a variety of reasons, including but not limited to academic breaks, other work opportunities at the University or study abroad programs. (*Id.*, at p. 5-6.) Among students working in the Library, the mean length of time in their respective Library positions is approximately 9 months (i.e., approximately one academic year). (*Id.*, at p. 6.) Approximately 86% of the students in Library positions have been in their current position for one academic year or less. (*Id.*, at p. 6 & 7.) 94% have been in their current position for two years or less. Virtually all (97%) have been in their current position for three years or less. (*Id.*, at p. 7.)⁴ When the students graduate or leave the University, they are not permitted to remain in their student library position beyond a one-quarter, transitional grace period. (*Id.*, at p. 7.)

The Library designs students' job schedules to accommodate their academic commitments. (*Id.*, at p. 5, 6.) Upon hire and at the beginning of each quarter, Library supervisors ask students to tell them how many hours they want to work and when they are available to work. (*Id.*, at p. 5.) The Library is flexible with student schedules, adjusting work days and hours to accommodate class schedules. (*Id.*, at p. 5.) Students who work in the Library are permitted virtually unlimited time off to study and focus on their academic pursuits. (*Id.*, at p. 5.) If a student has an upcoming exam or a paper deadline and notifies their supervisor, the supervisor will adjust the student's work schedule accordingly. (*Id.*, at p. 5.) Students typically request time off or reduce their hours significantly

⁴ The University compiled these statistics in May, 2017, anticipation of a pre-election hearing, and they were accurate as of the date the hearing would have taken place.

during final exams and the “reading period” leading up to final exams. (*Id.*, at p. 5.) Students tend not to work during academic breaks, such as winter break, and do not need supervisor approval to take several weeks of time off during academic breaks. (*Id.*, at p. 5.)

Finally, students in Library positions also enjoy more leniency with respect to adherence to work rules than staff employees. (*Id.*, at p. 5.) For instance, the University typically forgives students who violate attendance rules due to academic demands. (*Id.*, at p. 5.) Rather than disciplining a student for missing work without permission, the University attempts to resolve the problem and accommodate the student’s academic needs, often in conjunction with the student’s academic advisor. (*Id.*, at p. 5-6.) Students who work in the library are typically not subject to formal performance evaluations, and even when such evaluations occur, they are not evaluated as rigorously as staff employees. (*Id.*, at p. 6.)

The facts summarized above, which the Region refused to permit the University to prove at the hearing, go to both the issue of whether these students are statutory employees, as well as the University’s contention that, if these students are determined to be employees at all, their employment is temporary or casual at best.

IV. THE BOARD SHOULD DENY THE MOTION FOR SUMMARY JUDGMENT

A. Legal Standard

The only issue the University intends to dispute in this proceeding is whether the Region’s underlying decision to certify the bargaining unit was correct. While the Board will generally not allow re-litigation in an unfair labor practice case of issues that were or could have been raised in a prior representation proceeding, it will do so where “special circumstances” exist. *See, e.g., Brinks, Inc. of Florida*, 276 NLRB 1, 2 (1985). Special circumstances where an Employer raises a “substantial and material” issue that would statutorily preclude the Board from

certifying a Union as the exclusive representative of a petitioned-for unit. *Id.* at 2. In this case, as explained in detail below, the University has raised such an issue.⁵

B. *Columbia University* Was Wrongly Decided And Should Be Overruled

As a threshold matter, the University contends that the Board's decision in *Columbia University*, 364 No. 90 (2016) was wrongly decided and should be overruled for a variety of legal reasons and public policy considerations.⁶ Indeed, while the University provides work opportunities to enrolled students in order to assist with their education-related expenses and advance their academic and professional goals, it recognizes that students' focus on their studies and their substantial investment in obtaining a degree from the University is paramount. Thus, the University has implemented policies intended to further the University's primary mission, *i.e.*, to facilitate students' academic development and the completion of their degree in a timely fashion. As then-Chairman Phillip Miscimarra noted in his dissent in *Columbia University*, the Board's decision in that case disregarded the importance of timely degree completion, as well as the fact that "full-time enrollment in a university usually involves one of the largest expenditures a student will make in his or her lifetime, and this expenditure is almost certainly the most important financial investment the student will ever make." *Id.* at 23. He went on to note that "[m]any variables affect whether a student will reap any return on such a significant financial investment, but three things are certain: (i) there is no guarantee that a student will graduate, and roughly 40 percent do not; (ii) college-related costs increase substantially the longer it takes a student to graduate, and roughly 60 percent of

⁵ Although the University focuses its arguments on the Section 2(3) issue and whether, alternatively, the students at issue are temporary/casual employees not entitled to collectively bargain, and relatedly on the Region's refusal to permit the University to present evidence on these issues, the University does not waive and, if necessary, will continue to litigate in the Court of Appeals, the erroneous denial of its objections to the conduct of election. The erroneous denial of the University's objections provides a separate basis for invalidating the 2018 Supplemental Decision certifying the bargaining unit.

⁶ The Board has historically overruled precedent when necessary to return to well-established doctrine with a sound basis in the Act. *See, e.g., IBM Corp.*, 341 NLRB 1288 (2004).

undergraduate students do not complete degree requirements within four years after they commence college; and (iii) when students do not graduate at all, there is likely to be no return on their investment in a college education.” *Id.* at 22-23.

Recognizing the important policy consideration of facilitating students’ degree completion in a timely manner, the University has implemented policies specifically aimed to ensure that students who work are able to fully reap the benefit of the enormous financial and personal investment students and their families make in a University of Chicago education. For instance, it has created student-specific positions across campus that are designed to complement a student’s studies, with deference to their academic commitments. The University imposes strict maximum hour caps on student work, and only grants exceptions for good reason and in order to advance students’ academic goals. It prohibits students on a leave of absence from working in student positions to discourage students from taking time off their studies in order to work. The University’s Office of Student Employment works closely with departments and units across campus that utilize student workers to ensure that the necessary flexibility exists in student positions so that their academic commitments always take precedent over any work responsibilities. All of these policies demonstrate the University’s commitment to ensure students complete their degree on time.

Permitting these students to collectively bargain will interfere with this paramount interest. Then-Chairman Miscimarra cautioned in *Columbia University* against allowing students to resort to the “economic weapons” protected by the NLRA, which have the risk of detracting “from the far more important goal of completing degree requirements in the allotted time” *Id.* at 28. Allowing students to engage in collective bargaining, and to utilize all of the tools associated with it, has the potential to do just what established University’s policies are intended to counteract and what then-Chairman Miscimarra warned against, *i.e.*, interfering with students’ focus on their studies and timely

completion of degree requirements. In short, there are compelling policy considerations which warrant reconsideration of the Board's ruling in *Columbia University*.

C. The Regional Director Made Substantial Factual Errors In His Decision

1. The Regional Director Erred In Determining the Students Are Employees

As noted above, the University contends that the Board in *Columbia University* wrongly overturned *Brown University* 342 NLRB 483 (2004) and that *Brown University* sets forth the correct standard to determine whether the students in the petitioned-for units are "employees" under Section 2(3) of the Act. The *Brown University* Board held that students who also work for their University are not statutory employees because they "are primarily students and have a primarily educational, not economic, relationship with their university." Applying that standard, the Regional Director's decision that the University's Offer of Proof was insufficient to sustain its position that these students are not employees under the Act was clear error. As stated in the Offer of Proof, the University's witnesses would have testified that these students are at the University for the sole purpose of seeking a degree. While students are permitted to supplement their income and gain practical skills by working in the Library, they are only permitted to work in a student-specific position, limited to 20 hours per week absent special permission. Further, student positions are designed to be subordinate to and flexible around the students' academic commitments. Students typically do not work in the Library during academic breaks, and do not need to seek approval for time off during such periods. Students must leave their position at the Library if they graduate, take a leave of absence or otherwise leave active enrolled status at the University. Indeed, according to explicit written University policy, their work in the Library is secondary to their student status. In other words, under the correct standard set forth in *Brown University*, these students have a primarily academic relationship to the University and are not statutory employees.

2. Assuming For The Sake Of Argument That The Students Are Statutory Employees, The Regional Director Erred In Determining That They Are Not Temporary Or Casual Employees Excluded From The Unit

The Regional Director further committed substantial factual error by rejecting the University's Offer of Proof to sustain its contention that, even if these students are statutory employees, they are temporary employees, expressly excluded from the unit definition. There were a variety of factors set forth in the University's Offer of Proof which demonstrate that these students' relationship to the Library is temporary or casual in nature. Specifically: (a) students are hired on a quarter-to-quarter basis, not for an indefinite term; (b) students are limited to a maximum of 20 hours per week; (c) most students stay in their positions for one academic year or less; (d) students have flexible schedules built around their academic commitments, and students regularly take advantage of the opportunities to adjust their schedule to prioritize academics; (e) students frequently come and go from their positions with the Library in order to pursue other opportunities such as a research position or study abroad program; (f) students are not required to come to work during academic break periods, the summer break, or when pursuing study abroad programs; (g) students are subject to lenient attendance standards; and (h) performance standards for students are equally lenient, and different from the regular standards for Library staff employees. In short, if these students are statutory employees, their "employment" is temporary or casual at best and, as such, they are specifically excluded from the unit definition. The Regional Director's decision to disregard these proffered facts and not permit the University to introduce evidence to sustain them constituted substantial factual error.

3. The Regional Director's Stated Basis For Rejecting The University's Offer Of Proof Was Prejudicial Error

a. The Regional Director Erred In Denying The University The Right To Present Evidence To Show That The Students In The Proposed Unit Are Not Employees Under The Act

The Regional Director's decision to deny the University the opportunity to litigate the employee status issue, simply because (as the Hearing Officer relayed at the hearing) there is "established Board law" on the matter, was erroneous, prejudicial and does not comport with due process. Compounding this error, in the DDE issued one week after the hearing, the Regional Director contradicted himself, asserting that he rejected the Offer of Proof not because there is "established Board law," but rather, because it was "insufficient" to sustain the University's contentions. Apart from the fact that this belated explanation contradicted what the Hearing Officer said at the hearing, it is inaccurate because, as described above, there were ample facts in the Offer of Proof to support the University's contentions.

With regard to the original stated basis for rejecting the Offer of Proof, the fact that there is established precedent on what constitutes employee status is not a valid basis to reject a party's offer of proof under Board Rules. Rather, the Board's Rules and Regulations provide only that "[i]f the Regional Director determines that the evidence described in an offer of proof is insufficient to sustain the proponent's position, the evidence shall not be received." Section 102.66(c). Here, the Regional Director belatedly made such a finding in his DDE, even though that is not what the Hearing Officer stated at the hearing.

Second, Rule 102.66(a) provides that *any* "party shall have the **right** to appear at any hearing in person ... to call, examine, and cross-examine witnesses, and to introduce into the record evidence of the significant facts that support the party's contentions and are relevant to the existence of a question of representation." (Emphasis added.) The Regional Director denied this right to the University.

Third, the General Counsel issued guidance on representation cases which specifically directs that "[i]ssues as to whether individuals are employees within the meaning of Section 2(3) of the Act

must be litigated at the initial hearing.” Guidance Memorandum on Representation Case Procedure Changes Effective April 14, 2015, Memorandum GC 15-06, 2015 WL 1564882 (N.L.R.B.G.C. April 6, 2015) at pp. 16-17. The Regional Director’s decision not to take evidence on this issue is inconsistent with Memorandum GC 15-06.

Finally, the Regional Director’s erroneous decision is inconsistent with principles of fairness and due process and clearly prejudiced the University. By denying the University the right to offer evidence in support of its position, the Regional Director frustrated the University’s ability to build a record to support its position that these students are not employees. This error has significant implications: if a court of appeals ultimately reviews the decision in this case, the court will need record evidence to evaluate the University’s arguments that *Columbia University* applied the wrong standard and/or that the petitioned-for students in this unit are not statutory employees. The Regional Director’s denial of due process to the University prevents it from developing that record, and that error is fundamentally and substantially prejudicial to the University.

b. The Region Also Erred In Denying The University The Right To Present Evidence To Show That The Students Are, At Best, Temporary Or Casual Employees

As noted above, the University offered a myriad of facts that demonstrate the temporary and casual nature of these employees. Here, the evidence the University sought to admit directly supports its alternative position: if these students are employees under the Act, the petitioned-for unit consists of temporary and/or causal employees. Again, the University had the right under Section 102.66(a) to “introduce into the record evidence of the significant facts that support the party’s contentions,” and the Regional Director denied that right to the University in this case. Thus, it was clearly erroneous to deny the University the right to introduce evidence to prove up the factors that demonstrate the temporary and/or casual nature of these students’ relationship to the Library.

Footnote 130 in the *Columbia University* decision states that “[t]o the extent that cases like *San Francisco Art Institute*, 226 NLRB 1251 (1976), suggest that the mere fact of being a student in short-term employment with one’s school renders one’s interests in the employment relationship too ‘tenuous,’ such cases are incompatible with our holding here today and are overruled.”⁷ Thus in a footnote the Board majority erased a principle that was deemed sound by the Board for over forty years. However, the basis of the University’s position that students who work in the Library are temporary employees is *not* that these students are temporary *merely* due to the fact that they are students with an *inherently short-term relationship* with their school. Rather, students who work in the Library are temporary employees for all of the factual reasons summarized above. These facts would render them temporary employees even if they were not also students. Furthermore, footnote 130 in the *Columbia* decision, standing alone, does not alter the Board’s long-standing test for temporary and/or casual employment, nor does it challenge the proposition set forth in *San Francisco Art Institute* and *Saga Foods*, 212 NLRB 786 (1974), that it would not advance the interests of the Act to permit temporary and/or casual employees to collectively bargain.

Consistent with these legal principles, University’s Offer of Proof articulated a number of factors beyond their status as students which support its position that the petitioned-for students are temporary and/or causal employees who should not be permitted to collectively bargain. Furthermore, the Petitioner’s own unit description specifically excludes “temporary employees.” Yet, the University was denied the right to introduce evidence to establish how the students’ relationship to the library is so temporary or casual in nature, such that they would not have a sufficient continuing interest in the terms and conditions of employment to permit collective bargaining.

⁷ The University contends that the Board’s decision in *Columbia University* to overrule in part *San Francisco Art Institute* was incorrect.

Additionally, the University was denied the ability to distinguish the students covered by this petition from students in other cases such as in *University of West Los Angeles*, 321 NLRB 61 (1996). As explained in the University's Offer of Proof, the students who work in the University Library system are distinguishable from the student library clerks in *University of West Los Angeles* and the Regional Director should have permitted the University to present evidence to advance that argument.

In short, the Regional Director's decision to deny the University the right to introduce evidence to demonstrate that the students in the petitioned-for unit are temporary and/or casual employees excluded from the bargaining unit based on the Union's own unit description and under Board law, was plainly erroneous. This decision was also clearly prejudicial and denied the University due process.

V. CONCLUSION

As argued above, the Board's decision in *Columbia University* was wrongly decided and should be overruled for a variety of legal reasons and public policy considerations. This case offers the Board an opportunity to right the wrongs of *Columbia University*, especially *Columbia's* unwarranted overruling of the *San Francisco Art Institute* line of cases.

Moreover, throughout the proceedings in the underlying representation case, the University attempted to present evidence that the proposed unit consists of individuals who are not employees as defined by the Act and who, even if they are employees, are temporary and/or casual employees specifically excluded from the proposed bargaining unit and/or are not entitled to collectively bargain under the Act. Region 13 refused to allow the University to present evidence on these points, which prevented the University from developing an evidentiary record on critical, statutory issues. In short, the Region ran roughshod over the University's rights and certified a unit without giving

the University an opportunity to present evidence on determinative issues. Because the underlying decision to certify the bargaining unit was plain error, the Board should deny the General Counsel's Motion for Summary Judgment and vacate the 2018 Supplemental Decision.

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Respectfully submitted,

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